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The Gross Progeny: An Empirical Analysis

Youssef Chouhoud

Perry A. Zirkel

The *Goss* Progeny: An Empirical Analysis

YOUSSEF CHOUHOUD*
PERRY A. ZIRKEL**

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Last year, upon the thirtieth anniversary of the Supreme Court's decision in *Goss v. Lopez*, the then-general counsel of the National School Boards Association decried the expansion of *Goss* from a "three minute give and take" to the "paralysis" of public school discipline.[1] For example, she initially ascribed the following effect to the *Goss* Court: "By making student discipline a constitutional issue, by elevating it to a 'federal issue,' the court has left educators fumbling away through their

* Youssef Chouhoud is a graduate student in political science at Lehigh University.
** Perry A. Zirkel, University Professor of Education and Law, Lehigh University.

1. Julie Underwood, Commentary, *The 30th Anniversary of* Goss v. Lopez, 198 EDUC. L. REP. 795, 797, 802 (2005).

daily disciplinary dealings with students wondering and working at their peril."[2] This Article empirically examines *Goss* and its lower court progeny to determine whether they pose the major problem that is often ascribed to them.

I. THE *GOSS* DECISION

On January 22, 1975, in the wake of its landmark dicta that "students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate,"[3] the Supreme Court decided what has been described as "the most significant United States Supreme Court case on student discipline."[4] In *Goss v. Lopez*, the Court held that "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause."[5] More specifically, finding the requisite property interest in the state compulsory education statute and, alternatively, the requisite liberty interest in the potentially serious reputational damage,[6] and balancing them against the public schools' interest in "discipline and order,"[7] the majority held:

> [D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[8]

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2. *Id*. at 803. In fairness, we observe that she was then serving as the national advocate for school boards, which are the defendants in such suits; she ultimately ascribed the expansion of *Goss* to state laws; and she admitted to lacking the research data to support this purported causal relationship. *Id.*

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Although symbolically significant as a turning point for both students and teachers in terms of the modern era of education litigation, this dictum was specific to their "constitutional rights to freedom of speech or expression." *Id.* Nevertheless, the *Goss* Court cited *Tinker* in terms of students' constitutional rights more generally. Goss v. Lopez, 419 U.S. 565, 574 (1975). For a compilation of the Supreme Court's education-related decisions, including the vote in each one, see PERRY A. ZIRKEL ET AL., A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION (4th ed. 2001).

4. David M. Pedersen, *A Homemade Switch Blade Knife and a Bent Fork: Judicial Place Setting and Student Discipline*, 31 CREIGHTON L. REV. 1053, 1066 (1998). Attorney Pedersen is the former chairman of the National School Boards Association Council of School Attorneys. *Id.* at 1053 n.†.

5. *Goss*, 419 U.S. at 581. In reaching this conclusion, the Court recognized its tradition of deference to public school authorities. *Id*. at 578.

6. *Id.* at 574. Although the Supreme Court has more recently elevated the standard for the requisite deprivation of liberty, *Goss* reasoned that the charges of misconduct, "[i]f sustained and recorded, . . . could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575.

7. *Id.* at 580. For the third, or intersecting, factor in the equation, the Court reasoned: "The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Id.*

8. *Id.* at 581.

Based on this same two-step analysis of procedural due process (PDP) under the Fourteenth Amendment,[9] the Court added various significant clarifications,[10] including that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[11]

The dissent, led by former school board member Lewis Powell,[12] characterized the holding as an "unprecedented" and "unnecessary" judicial intrusion[13] that, expressly echoing Justice Black's dissent in *Tinker*,[14] signaled a flood of litigation[15] and judicial oversight.[16]

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9. The Court followed the conventional two-step analysis. *Id.* at 572–80; *see, e.g.*, Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 HARV. L. REV. 1106, 1106 (1981) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10–12, at 532–33 (1978)). The two steps are whether process is due and, if so, how much process is due. *Goss*, 419 U.S. at 577. The first is based on the nature of the interest beyond a *de minimis* level, and the second is based on the weight of the interest, including the risk of error, balanced against the institutional, or governmental, interest. *Id.* at 572–80.

10. One clarification: The Court excluded from this "countrywide" constitutional minimum "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss*, 419 U.S. at 583. In referring to this countrywide minimum, the Court appeared to imply what is otherwise generally understood—that states and local school districts may adopt policies that exceed the Court's foundational requirements.

11. *Id.* at 584.

12. Prior to his tenure on the Court, Powell served as chair of the school board in Richmond, Virginia, followed by a stint on Virginia's State Board of Education. *See* J. Harvie Wilkinson III, Goss v. Lopez*: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 46 (1975) (citing A.E. Dick Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 458–59 (1972)).

13. *Goss*, 419 U.S. at 585, 595 (Powell, J., dissenting). Failing to see the principled limit in the majority opinion for *de minimis* denials of liberty or property, Powell issued this forewarning with regard to various typical school actions, such as grading, promotion, transfers, and exclusion from extracurricular activities: "If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed." *Id.* at 599.

14. *Id.* at 600 n.22 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting)).

15. *Id.*; *see also id.* at 585 ("[O]pens avenues for judicial intervention in the operation of our public schools."); *id.* at 597 (depicting the Court as entering a "new 'thicket'"); *id.* at 599 ("[T]he federal courts should prepare themselves for a vast new role in society.").

16. *Id.* at 585; *id.* at 599; *see also id.* at 594 (noting the decision's "indiscriminate reliance upon the judiciary . . . as the means of resolving many of the most routine problems arising in the classroom."); *id.* at 597 (expressing concern about "constitutionalization of the student-teacher relationship").

II. POPULAR AFTERMATH

In the immediate wake of *Goss*[17] and periodically thereafter,[18] various commentators characterized *Goss* and its lower court progeny as disabling school discipline. The mass media,[19] special interest groups,[20] and even professional publications have reinforced this conception.[21]

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17. *See* ELLEN JANE HOLLINGSWORTH ET AL., SCHOOL DISCIPLINE, ORDER AND AUTONOMY 114 (1984) (citing negative predictions in education publications); Henry Lufler, Jr., The School Law Litigation Explosion: A Specious Generalization 1–2 (Nov. 1988) (unpublished paper presented at the annual conference of the National Organization on Legal Problems of Education, on file with the author) (citing negative predictions in education and legal publications). The negative scholarly commentary was rather restrained, with authors conditioning their predictions on the response of school officials. *See, e.g.*, David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 863–64 (1976); Leon Letwin, *After* Goss v. Lopez*: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 662 (1977); Wilkinson, *supra* note 12, at 60, 66; *cf.* Burton B. Goldstein, Jr., Note, *Due Process in the Public Schools*, 54 N.C. L. REV. 641, 674–75 (1976) (conditioning negative commentary on extent of expansion to other school decisions, suggesting that it serves as an invitation to more informal, customized procedures); Mark G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891, 917–18 (predicting the possibility of procedural regularity eclipsing substantive fairness).

18. For scholarly criticism of the *Goss* decision during the mid-1980s, see, for example, David Schimmel & Richard Williams, *Does Due Process Interfere with School Discipline?*, 68 HIGH SCH. J. 47, 48 (1985) (citing statement that decisions like *Goss* "'deprive school administrators of the tools they need to control school violence'" (quoting Robert Pear, *Reagan Expected to Present Plan to Fight Crime in Public Schools*, N.Y. TIMES, Jan. 1, 1984, at A1)). For more recent similar attributions to *Goss*, see Underwood, *supra* note 1, at 800–03; Richard Arum, *For Their Own Good: Limit Students' Rights*, WASH. POST, Dec. 29, 2003, at A17; George F. Will, *Schools Beset by Lawyers and Shrinks*, WASH. POST, June 15, 2000, at A33.

19. The following observation about newspaper and magazine coverage is an understatement, and is even more of an understatement for television coverage: "That the plaintiffs in novel cases invariably were unsuccessful was less well publicized than that the cases were filed in the first place." Henry S. Lufler, Jr., *Courts and School Discipline Policies*, *in* STUDENT DISCIPLINE STRATEGIES 197, 205 (Oliver C. Moles ed., 1990); *see also* Larry Bartlett, *Legal Responsibilities of Students: Study Shows School Officials Also Win Court Decisions*, 69 NASSP BULL. 39, 39 (1985). For modern examples of such coverage, see Perry A. Zirkel, *Judgment Day*, 83 PHI DELTA KAPPAN 561, 561–62 (2002); Perry A. Zirkel, *The Midol Case*, 78 PHI DELTA KAPPAN 803, 803–04 (1997) (discussing suspension or expulsion cases that attracted national media attention and that included a PDP claim).

20. The current leading organization on this subject is Common Good. *See, e.g.*, Public Agenda, "I'm Calling My Lawyer": How Litigation, Due Process and Other Regulatory Requirements Are Affecting Public Education 11 (2003), http://cgood.org/learn-reading-cgpubs-polls-8.html. For a summary of the previous efforts of other such interest groups, see, for example, Perry A. Zirkel, *The Coverdell Teacher Protection Act: Immunization or Illusion?*, 179 EDUC. L. REP. 547, 547–51 (2003).

21. Lufler, *supra* note 17, at 10, attributed this reinforcing tendency to a slowness in education law commentators' recognition of changes in litigation patterns. Other overlapping reasons may include: (1) a preventive law orientation that blurs the line with

III. RELATED RESEARCH

A. Educators' Knowledge and Attitudes

Survey studies since the late 1970s have generally found that educators generally had low levels of knowledge of students' Fourteenth Amendment PDP rights under *Goss*.[22] Due in part to misinformation and uncertainty, educators tended to perceive that the Court had constrained educators' discretion in the discipline of students.[23]

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latitude for the sake of risk avoidance, (2) a mixing of normative notions of best education practice with legal requirements, (3) the professional self-interest of magnifying the importance of such matters, and (4) the focus on individual cases or issues, thus missing the forest for the trees.

22. Nelda H. Cambron-McCabe & William P. Shula, Jr., *Student Suspensions:* Goss *Requirements Revisited*, *in* EDUC. L. UPDATE 1987–1988 1, 6–8 (1988) (studying elementary principals nationally); David Schimmel & Matthew Militello, *Legal Literacy for Teachers: A Neglected Responsibility*, 77 HARV. EDUC. REV. 257, 261 (2007) (surveying teachers in seventeen states); Lee E. Teitelbaum, *School Discipline Procedures: Some Empirical Findings and Some Theoretical Questions*, 58 IND. L.J. 547, 560–61 (1983) (studying high school principals, counselors, and teachers in Indiana); John Dominic Gascue, An Assessment of Nevada's Secondary School Administrators' Level of Knowledge Regarding Procedural Due Process for Students 115–17 (1982) (unpublished doctoral dissertation, University of San Francisco) (surveying secondary school principals and assistant principals in Nevada); Francie Velazquez, An Attitudinal Study of School Administrators Towards Due Process and its Implications in an Urban Massachusetts School District (May 1990) (unpublished doctoral dissertation, University of Massachusetts) (studying administrators in one urban district); *see also* Ellen Jane Hollingsworth, *The Impact of Student Rights and Discipline Cases on Schools*, *in* 2 SCHOOLS & THE COURTS 45, 56–57 (Malcolm M. Feeley et al. eds. 1979) (surveying Wisconsin junior and senior high school teachers). Hollingsworth's study was the only one that specifically examined the direction of the error, finding teachers thought that *Goss* had provided more procedural rights to students than it had. For further interpretation by one of her fellow researchers, see Henry S. Lufler, Jr., *Unintended Impact of Supreme Court School Discipline Decisions*, *in* CONTEMPORARY LEGAL ISSUES IN EDUCATION 102, 108 (M.A. McGhehey ed., 1979). *Cf.* Susan J. Hillman, Knowledge of Legally Sanctioned Discipline Procedures by School Personnel 8, 12 (Apr. 1985), *available at* http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED263659 (finding 71% of principals but only 27% of counselors and 18% of teachers had knowledge of all *Goss* rights in study of fifteen Indiana high schools).

23. *See, e.g.*, Hollingsworth, *supra* note 22, at 59 (studying Wisconsin junior and senior high school teachers); Lufler, *supra* note 22, at 102–03, 109 (studying Wisconsin secondary school teachers in 1977); Julius Menacker, *Teacher Fears of Parents Suits and School Board Dismissals for Discipline Actions: Are They Justified?*, 23 NOLPE NOTES 1, 1 (Feb. 1988) (studying Chicago elementary school teachers in 1987). *But cf.* Teitelbaum, *supra* note 22, at 561 (studying Indiana high school principals, counselors, and teachers in 1981); Helen Ashwick, *School Discipline Policies and Practices*, BULL. OERI 2 (Sept. 1986) (U.S. Dep't of Educ., Office of Educational Research and

B. Case Law Frequency and Outcomes

The empirical research of pertinent pre-*Goss* case law is relatively limited. Without clearly defining their data collection procedures, Clayton and Jacobsen found 158 published court decisions concerning student rights, including thirty suspension or expulsion cases, for the period from 1960–1971.[24] They found that the vast majority of the suspension and expulsion cases were during the last three years of this eleven-year period and that students won 67% of these cases.[25] Similarly, demarcating his boundary as "published cases in which a student . . . challenged the *content* of a school board rule or regulation" and citing as his source the *World Almanac and Book of Facts*,[26] Friedman found that the number of student rights cases and their winning percentage was at a relatively low level for each ten-year period from 1899–1908 to 1959–1968.[27] The number of student rights cases for 1969–1978 jumped more than tenfold from the number of cases during the 1899–1908 period, and the winning percentage tripled from the 1959–1968 period to 48%, but Friedman did not disaggregate the data on each side of the date of *Goss*.[28]

The empirical research post-*Goss* is more extensive. In a study of "[a]ll reported suspension and expulsion decisions from 1965–1987,"[29] Lufler found that, rather than increasing, the frequency of PDP decisions notably decreased in the wake of *Goss*.[30] Moreover, he found that after

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Improvement, Center for Statistics survey summary on file with the author) (finding 75%–80% of secondary principals nationally perceived *Goss* requirements as a small operational burden, whereas 50%–67% perceived state and local procedural additions to *Goss* as moderate or large operational burden).

24. Elwood M. Clayton & Gene S. Jacobsen, *An Analysis of Court Cases Concerned with Student Rights 1960–1971*, 58 NASSP BULL. 49, 50–52 (1974). They did not provide any further information as to the selection procedures or criteria, including which decisions were based on PDP.

25. *Id.* at 50. They did not further identify, much less define, their outcome classifications.

26. Lawrence M. Friedman, *Limited Monarchy: The Rise and Fall of Student Rights*, *in* SCHOOL DAYS, RULE DAYS 238, 242–43 (David L. Kirp & Donald N. Jensen eds., 1986).

27. *Id.* at 243. The average number of student rights cases for these decades was 13.8. The success rate for the plaintiff students was 16%. *Id.*

28. *Id.*

29. Lufler, *supra* note 17, at 2. The only operational boundary that Lufler offered was that he used the "WestLaw headnote for suspension and expulsion" cases. *Id.* at 2 n.6. He divided the cases into two categories—procedural, which appears to correspond at least approximately to what we refer to as PDP, and substantive, which he subdivided into "five issue areas: hair and appearance, expression, drugs and alcohol, other penalties, and a residual 'other rules' category." *Id.* at 6.

30. Specifically, his five-year totals were as follows: 1965–69 = 10; 1970–74 = 49; 1975–79 = 27; 1980–84 = 17; and 1985–89 = 20 (extrapolated from a three-year total of 12). *Id.* at 5.

Goss, the majority of the conclusive outcomes[31] remained, and indeed slightly increased, in favor of school authorities rather than students.[32] In view of these findings, Lufler concluded that *Goss* "did not touch off an explosion of new procedural cases, as commentators [had] predicted."[33]

In a subsequent study covering the latter part of the same period (from 1979 to 1987) and limited to published decisions cited in the successive *Yearbooks of School Law*,[34] Lufler obtained similar results.[35]

More recently, in a book that gave primary attention to *Goss*,[36] Arum and one of his research associates, Beattie, included frequency and outcomes analyses of the 1204 court decisions concerning student discipline from 1960 to 1992.[37] Paralleling and extending Lufler's purely PDP findings,

31. Lufler used two outcome categories, providing only one clarification: "If the case was remanded without a final judgment, it was not counted at all." *Id.* at 3.

32. Specifically, the percentage of the decisions that he reported in favor of the district defendants for the five-year periods were as follows: 1965–69 = 60%; 1970–74 = 55%; 1975–79 = 56%; 1980–84 = 59%; 1985–87 = 67% (based on first three years of this period). *Id.* at 5. He did not provide corresponding longitudinal outcomes data for the substantive category and its subcategories, although he found that the overall proportion in favor of district defendants for the substantive category was 61%. *Id.* at 9. Nonempirical analyses of the *Goss* progeny between 1975 and 1988 generally support the overall prevalence of the outcomes in favor of the school authorities. *See, e.g.*, Dolores Cooper & John L. Strope, Jr., *Short-Term Suspensions Fourteen Years Later*, 58 EDUC. L. REP. 871, 881 (1990); Dolores J. Cooper & John L. Strope, Jr., *Long-Term Suspensions and Expulsions After* Goss, 57 EDUC. L. REP. 29, 41 (1990).

33. Lufler, *supra* note 17, at 15. He included in tandem with *Goss*, the Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975), which is not the focus of the present study and which, contrary to Lufler's characterization, did not "extend[] student procedural rights in school expulsion cases." Lufler, *supra* note 17, at 5 n.8. The *Wood* decision, in which the Court clothed school officials with qualified immunity from liability in civil rights suits, arose as a result of a substantive due process violation. 420 U.S. at 310, 315.

34. This selection boundary is even less clear-cut and congruent with *Goss*, because it depends on the classification by the chapter authors, who varied during this period, into respective "suspension" and "expulsion" categories that included various legal bases beyond PDP, such as the substantive subcategories in Lufler's previous study.

35. Lufler, *supra* note 19, at 211–12. Specifically, he found that the frequency of suspension and expulsion decisions fluctuated from 1979 to 1989 and that—again with a rather simplistic outcomes classification—the proportion in favor of districts was 75%. *Id.* The differences are likely attributable to the lack of congruent time periods and selection boundaries. *See supra* note 29 and accompanying text.

36. RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 38, 63 (2003) (portions co-authored with Irenee R. Beattie). Arum's book contains other research, but the study reported in the two chapters co-authored with Beattie are the pertinent ones for the purpose of this Article.

37. Their rather vague selection criterion was that the court decisions "directly involved individuals or organizations contesting a school's right to discipline and control

their results for the frequency of this broader line of decisions averaged approximately eight per year for the period 1960–1968, increased precipitously to a high point of one hundred in 1970 and dropped almost as rapidly to a relatively stable average of approximately fifty per year in the seventeen-year period since *Goss*.[38] The average for the up-and-down six years from 1969 to 1975, which Arum and Beattie called the "student rights contestation" period,[39] was seventy-six cases per year.[40] The respective annual averages for the suspension and expulsion cases were approximately eight, fifty-seven, and twenty-nine for the successive periods before, during, and after this designated contestation phase.[41]

In a separate chapter entitled *How Judges Rule*, Arum and his associate provided the "predicted probability of a court decision in favor of a student litigant" for these same cases.[42] The results, which they presented in graphical form, showed a steep increase from 36% in 1960 to the high point of 50% in 1968, then dropping to a brief plateau at 44%

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students." *Id.* at 16, 55–56. Their subsequent note that they used a specified LEXIS search string helps provide clarification for replication, although it did not reference whether and how they avoided the problem of double counting. *Id*. at 220; *see infra* note 61. However, various larger selection decisions are subject to question. For example, they included cases in the private-, not just public-school context, thereby triggering distinct legal bases and judicial postures. ARUM, *supra* note 36, at 17. Conversely, they excluded federal district court decisions based on various questionable assumptions concerning the publication and equivalence of state and federal court decisions. *Id*. at 49–50, 288 n.29. In any event, the extent of PDP overlap is unclear. Although they obviously included substantive as well as procedural cases, the only categories that they identified were in terms of the form of discipline (suspension, expulsion, corporal punishment, transfer, and other discipline) and the type of student misbehavior (drugs, alcohol, violence/weapons, political protest, and free expression). *Id*. at 55, 220.

38. ARUM, *supra* note 36, at 53.

39. *Id*. at 5, 60. Arum and Beattie referred to the period on each side of 1969–1975, which is bounded at each end by *Tinker* and *Goss*, as "[p]re-[c]ontestation" and "[p]ost-[c]ontestation." *Id.* at 60, 67.

40. *Id*. at 18.

41. These extrapolated estimates are based on the proportions of suspension and expulsion cases that Arum and Beattie provided for the three periods: 95% of the 1960–1968 cases, 88% of the 1969–1975 cases, and 73% of the 1976–1992 cases. *Id.* at 55–56. They did not specify the percentages for the PDP cases. In any event, *Goss* (1975) marked the end, not the start of what they regarded as the contestation period, with, instead, *Tinker* (1969) being the beginning.

42. ARUM, *supra* note 36, at 88. They rather cryptically defined this variable as "the percentage likelihood of a pro-student outcome in a case, after controlling for how the case was unusual with regard to other factors that influenced the outcomes, such as region and type of student disciplinary infraction." *Id.* at 88. Their explanation that the predicted probabilities "were derived from logistic regression estimates of the effects of several covariates on pro-student decisions" does not provide the requisite clarity, including the absence of any definition of the basic outcome categorization of "pro-student." *Id.* at 292 n.4. The results reported in their tables for underived "pro-school" and derived "pro-student" decisions confound rather than resolve the matter. *Id.* at 217, 221. Moreover, they do not appear to fit with the derived data in the graph or with the findings of the other outcomes research reviewed herein.

from 1972 to 1977—a period punctuated by *Goss*—and steadily and less steeply declining to a low point of 35% in the final year of 1990.[43]

Although acknowledging that the judiciary, led by the Supreme Court, took a "decidedly pro-school turn" in the period after *Goss*,[44] Arum interpreted these findings as resulting in "a historical legacy with two prominent features"[45]—a student perception[46] and an institutional norm that both impeded discipline.[47] More specifically, the purported effect was that "schools were likely to reduce their disciplinary responses to student misbehavior while at the same time students became less willing to accept school authority or discipline as legitimate."[48] The primary problem with this conclusion—possibly attributable in part to the eleven-year gap between Arum's findings and his interpretation—is that it ignores the cumulating data in the post-contestation period.[49] Although there is undoubtedly a time lag, this student and school reaction would be cyclical, causing a new generation's organizational legacy in the direction of discipline.

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43. *Id.* at 88. Arum and Beattie did not explain why the graph ended in 1990 rather than 1992, but this disparity may be merely a matter of imprecise alignment.

44. *Id.* at 67. To support their contention, Arum and Beattie identified *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Board of Education v. McClusky*, 458 U.S. 966 (1982); *Carey v. Piphus*, 435 U.S. 247 (1978); and *Ingraham v. Wright*, 430 U.S. 651 (1977) as cases reflecting this "pro-school turn." ARUM, *supra* note 36, at 67–75. However, they missed for this purpose (as compared with their narrower selection criteria) one major decision in the same direction during this period that concerned control and indirectly concerned discipline of students—*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988).

45. ARUM, *supra* note 36, at 5–6.

46. Arum specifically described this perception as a "sense of legal entitlement that . . . has produced skepticism about the legitimacy of school disciplinary practices as well as a general familiarity with resorting to legal avenues to contest such practices." *Id.* at 6. Yet, apparently referring at least in part to his longitudinal outcomes analysis, Arum acknowledged that this sense is "not firmly grounded in accurate understanding of case and statutory law." *Id.*

47. Arum described this institutional effect less clearly as "school forms, practices, and culture—including widespread normative taken-for-granted assumptions about the necessity of organizing school discipline in particular ways." *Id.* at 6.

48. *Id.* at 13.

49. An additional problem is that this thesis regards *Goss* as a cause, when it may well be that it was merely a reflection and effect of a broader societal movement. *See, e.g.*, Donal M. Sacken, *Due Process and Democracy: Participation in School Disciplinary Processes*, 23 URB. EDUC. 323, 326–27 (1989).

Although Arum's frequency and outcomes data were for student discipline case law more generally, in a follow-up Op-Ed piece, he connected *Goss* to "students beg[inning] to assert newfound legal rights when they were being disciplined for . . . now typically . . . cases that largely involve school violence, weapons, drugs, and general misbehavior."[50] In a subsequent article, he repeated the mantra of the judicial erosion of school authority, associating *Goss* with the "impossibility of school discipline" and extending the connection to the tripling of the number of incarcerated youths.[51] Moreover, he imprecisely characterized the post-*Goss* line of litigation as extending to "low-level punishments (e.g., in-school detention or lowering a grade)."[52] Without providing any published reference after 1992, when his reported data ended, Arum asserted that "[i]n recent years, student and parental challenges to school discipline have risen sharply, with the number of appellate cases more than doubling from 1990 to 2000."[53] The results were even more lacking for outcomes than frequency. Without providing any figures at all, Arum implied that the decisions had been in favor of the plaintiffs rather than the schools, not only for these cases overall,[54] but also for the PDP cases concerning low-level punishments.[55]

In light of these rather dramatic and diffused pronouncements and the lack of more recent published data, the time is ripe for a systematic update that, taking one step at a time, is limited to a specific PDP focus. More specifically, this more refined systematic study of the direct lower court progeny of *Goss* addresses two questions: First, whether the *Goss* progeny[56] in more recent years resurged in frequency, and second,

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50. Arum, *supra* note 18.

51. Richard Arum, *Sparing Rods, Spoiling Children: The Impossibility of School Discipline*, 56 NAT'L REV., Oct. 11, 2004, at 43, 43–44. He accorded second billing to *Wood v. Strickland*, 420 U.S. 308 (1975), not making clear that it established qualified immunity. *Id.* at 44. See *supra* note 33 and accompanying text for more on the *Wood* case.

52. The imprecision was attributable to not providing a specific period of time "[a]fter *Goss*," vaguely referring to "student and parental challenges in court," and using the passive voice throughout his article. Arum, *supra* note 51, at 44.

53. *Id.*

54. This inference is based on the concomitant connection to the continued erosion of school authorities' discretion "on these issues." *See id.*

55. This inference is based on his recommendation that courts stop providing students with "due-process protections" for such "minor day-to-day discipline," for which he added restrictions on participation in interscholastic athletics as another example. *Id.* He similarly did not provide any specific data on the *Goss*-type cases concerning more severe forms of discipline, while recommending "full due-process protections" for long-term or permanent exclusions from school. *Id.*

56. The seemingly incidental and, in any event, unexplained graph in Underwood's *Goss* anniversary address does not come close to filling this gap. Containing no title and not accompanied by any introduction or discussion, it appears to show merely the number of lower court decisions that have cited *Goss* from 1975 to 2004. Underwood,

whether the *Goss* progeny in more recent years shifted outcomes back in the direction of the plaintiff-student. In addition, "systematic" study also means addressing other limitations in the previous line of research, which primarily fit in two categories: (1) lack of precise selection information, which is necessary for replication and interpretation,[57] and (2) the lack of a systematic outcome classification, which provides sufficient differentiation of mixed and inconclusive rulings.[58] The first category more specifically includes the lack of precise selection criteria, the mixing of other discipline decisions with those based on PDP,[59] which was the essence of the *Goss* decision,[60] and search procedures that avoid double counting, yet identify the latest pertinent published ruling for each case.[61]

IV. METHODOLOGY

In light of the data collection shortcomings in previous studies,[62] this study uses specific criteria and procedures for the selection of court decisions for the empirical analysis, including, but extending beyond, defining their "published"[63] status within the twenty-year timeframe of 1986–2005.[64]

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supra note 1, at 798. Although the descending and then roughly level slope is somewhat similar to Arum and Beattie's frequency graph, citations of *Goss* are obviously a far cry from student discipline cases that fit within its boundaries.

57. *See supra* notes 24, 26, 29, 34, and 37 and accompanying text.

58. *See supra* notes 25, 27, 31, and 42 and accompanying text.

59. *See supra* notes 24, 26, 29, 34, and 37 and accompanying text.

60. *See supra* notes 5–11 and accompanying text.

61. Electronic databases are susceptible to double counting, but when used carefully, allow for resolving this problem. *See, e.g.*, Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 343–44 n.20 (1997). For systematic study limited to a single issue, such as PDP in student discipline cases, the added necessary step—which this study took—was to track each case to its most recent published decision on this issue, eliminating the citations to the earlier rulings and only citing, not counting, the later rulings on other grounds.

62. *See supra* text accompanying notes 57, 59, and 60.

63. The study did not include decisions available through electronic databases, such as LEXIS and Westlaw, but not published in official reporters, such as "F. Supp." and "F.3d." *See, e.g.*, Gendelman v. Glenbrook North High School, No. 03-C-3288, 2003 WL 21209880 (N.D. Ill. May 21, 2003); Caston v. Benton Pub. Schs., No. 4:00CV00215WKU, 2002 WL 562638 (E.D. Ark. Apr. 11, 2002); Witvoet v. Herscher Cmty. Unit Sch. Dist., No. 97-CV-2243, 1998 WL 1562916 (C.D. Ill. May 27, 1998); Anvar v. Regents of Univ. of Cal., No. B178912, 2005 WL 2789331 (Cal. Ct. App. Oct. 27, 2005); Fortune v. City of Detroit Pub. Sch., No. 248306, 2004 WL 2291333 (Mich. Ct. App. Oct. 12, 2004). Additionally, we did not include decisions available only in

First, the study included only those decisions that arose in K-12 schools, not other contexts. Therefore, suspension and expulsion decisions that arose in private schools[65] or post-secondary institutions[66] were excluded.

Second, the study only included cases where at least one basis of the court's decision was Fourteenth Amendment PDP in terms of the *Goss* notice/hearing rationale, or state-law PDP that expanded upon *Goss*'s procedural protections.[67] Thus, for example, if the plaintiff was a special education student who raised, and the court decided, issues based on the Individuals with Disabilities Education Act (IDEA) and Fourteenth Amendment or state-law PDP, the study included the case but only considered the PDP ruling.[68] As a result, the analysis excluded suspension or expulsion decisions where the court relied solely on other grounds, such as: (1) Fourteenth Amendment void-for-vagueness,[69] which is only partly, and not predominantly, a matter of PDP,[70] (2) Fourteenth Amendment Substantive Due Process,[71] (3) First Amendment expression,[72] or (4) the

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state reporters, such as state trial court decisions not available in official regional reporters. *See, e.g.*, Mullane v. Wyalusing Area School District, 30 Pa. D. & C. 4th 179 (C.P. 1996). Nevertheless, we used multiple sources to be as exhaustive as possible within our prescribed boundaries, carefully culling out cases that did not fit. These sources included: (1) The Westlaw key numbers for student discipline, with the search terms *Goss* or *due process*; (2) the Education Law Association's YEARBOOK OF SCHOOL LAW for each previous year in the study's period; (3) the index references under *suspension* and *expulsion* in the leading education law texts; and (4) a LEXIS Boolean search in its education law database.

64. More specifically, the boundaries for the date of decision were January 1, 1986 to December 31, 2005.

65. *See, e.g.*, Hernandez v. Don Bosco Preparatory High, 730 A.2d 365, 367 (N.J. Super. Ct. App. Div. 1999); Allen v. Casper, 622 N.E.2d 367, 368 (Ohio Ct. App. 1993).

66. *See, e.g.*, Brown v. W. Conn. State Univ., 204 F. Supp. 2d 355, 356 (D. Conn. 2002); Hill v. Bd. of Tr. of Mich. State Univ., 182 F. Supp. 2d 621, 623 (W.D. Mich. 2001).

67. For decisions based on the threshold step of whether procedural process is due, see *infra* notes 76–81 and accompanying text.

68. *See, e.g.*, S.W. v. Holbrook Pub. Sch., 221 F. Supp. 2d 222, 225, 229 (D. Mass. 2002); Waln v. Todd County Sch. Dist., 388 F. Supp. 2d 994, 1000, 1003 (D.S.D. 2005).

69. *See, e.g.*, Packer v. Bd. of Educ. of Thomaston, 717 A.2d 117, 135 (Conn. 1998); Hamilton v. Unionville-Chadds Ford Sch. Dist., 693 A.2d 655, 656–57 (Pa. Commw. Ct. 1997).

70. The other, and weightier, component is generally understood to be substantive due process. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (concluding that the void-for-vagueness doctrine was more a matter of "arbitrary . . . enforcement," that is, substantive due process, than "actual notice," that is, procedural due process (citing Smith v. Goguen, 415 U.S. 566, 574 (1974))).

71. *See, e.g.*, Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000); Commons v. Westlake City Sch. Bd. of Educ., 672 N.E.2d 1098, 1104 (Ohio Ct. App. 1996).

72. *See, e.g.*, Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 626–27 (8th Cir. 2002). Additionally, by extension, we excluded suspension and expulsion cases based on the overbreadth doctrine. *See, e.g.*, Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997).

IDEA.[73] Similarly, the study did not include cases where the decision was based on a threshold issue, such as subject matter jurisdiction[74] or separable, post-PDP proceedings.[75]

Last, the study included only those decisions in which the court determined that school authorities had deprived the student of the requisite PDP liberty or property interest. Thus, the study did not include court decisions where the student claimed, but the court rejected, such a deprivation. Examples of such exclusions were those where: (1) the school's action was limited to removing the student from extracurricular activities,[76] (2) school authorities purportedly suspended or expelled the student, but the court concluded that the student had suffered no cognizable educational loss,[77] and (3) school authorities took disciplinary action, regardless of whether or not they characterized it as a suspension or expulsion, but the court did not apply PDP based on the conclusion that the deprivation was *de*

73. *See, e.g.*, Farrin v. Me. Sch. Admin. Dist. No. 59, 165 F. Supp. 2d 37, 40 (D. Me. 2001); Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1446 (D. Ariz. 1997).

74. *See, e.g.*, Webb v. Ironton City Sch., 686 N.E.2d 285, 288 (Ohio Ct. App. 1996); *In re* JAD, 782 A.2d 1069, 1071 (Pa. Commw. Ct. 2001); *cf.* D.L. v. Unified Sch. Dist., No. 497, 392 F.3d 1223 (10th Cir. 2004) (vacating due to Younger abstention doctrine); Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1312–13 (8th Cir. 1997) (holding that plaintiff failed to comply with exhaustion doctrine); State *ex rel*. Yarber v. McHenry, 915 S.W.2d 325, 330 (Mo. 1995) (holding that case was in improper venue).

75. *See, e.g.*, Cohn v. New Paltz Cent. Sch. Dist., 363 F. Supp. 2d 421, 432–33 (N.D.N.Y. 2005) (rejecting student's 42 U.S.C. § 1983 PDP claim due to adequate post-deprivation remedies).

76. *See, e.g.*, Poling v. Murphy, 872 F.2d 757, 764 (6th Cir. 1989); Smith v. Chippewa Falls Area Unified Sch. Dist., 302 F. Supp. 2d 953, 957 (W.D. Wis. 2002); Wooten v. Pleasant Hope R-VI Sch. Dist., 139 F. Supp. 2d 835, 840, 842 (W.D. Mo. 2000); Brands v. Sheldon Cmty. Sch., 671 F. Supp. 627, 631 (N.D. Iowa 1987); Ryan v. Cal. Interscholastic Fed'n—San Diego Section, 114 Cal. Rptr. 2d 798, 807 (Ct. App. 2001); L.P.M. v. Sch. Bd. of Seminole County, 753 So. 2d 130, 132 (Fla. Dist. Ct. App. 2000); Jordan v. O'Fallon Twp. High Sch. Dist. No. 203 Bd. of Educ., 706 N.E.2d 137, 140, 141 (Ill. App. Ct. 1999). The exceptions, which we included in the analysis based on the courts' ruling on the second step of the PDP framework, were *Palmer v. Merluzzi*, 868 F.2d 90, 93 (3d Cir. 1989); *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1323–24 (7th Cir. 1988); and *Butler v. Oak Creek-Franklin School District*, 116 F. Supp. 2d 1038, 1053 (E.D. Wis. 2000).

77. *See, e.g.*, Jacobs v. Clark County Sch. Dist., 373 F. Supp. 2d 1162, 1192–93 (D. Nev. 2005) (ruling that no loss of property interest resulted from school's expulsion because parents subsequently home-schooled the student); Gonzalez v. Torres, 915 F. Supp. 511, 517 (D.P.R. 1996) (finding no deprivation where student voluntarily transferred out of school before serving the expulsion).

minimis for *Goss* purposes,[78] including, but not limited to, situations where school authorities transferred the student either to another school[79] or, in the majority of cases,[80] to an alternative education program.[81]

The following empirical analyses are in terms of frequency and outcomes, both of which have particular meanings in the context of this study. "Frequency" has two applications with regard to this empirical analysis. First, it refers, per the customary meaning, to the number, or volume, of relevant cases during a given time period.[82] Second, for more precision in the subsequent analysis accompanying the tabulation

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78. *See, e.g.*, Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1080–81 (5th Cir. 1995) (addressing brief incarcerating isolation); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 562–63 (8th Cir. 1988) (addressing in-school suspension); Casey v. Newport Sch. Comm., 13 F. Supp. 2d 242, 246 (D.R.I. 1998) (discussing removal of student from science class); Rasmus v. Arizona, 939 F. Supp. 709, 716–17 (D. Ariz. 1996) (involving a ten-minute time-out); Obersteller v. Flour Bluff Indep. Sch. Dist., 874 F. Supp. 146, 148 (S.D. Tex. 1994) (involving a punitive grade); Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155, 157–58 (E.D. Tenn. 1987) (addressing a time-out); Slocum v. Holton Bd. of Educ., 429 N.W.2d 607, 611–12 (Mich. Ct. App. 1988) (discussing a grade reduction resulting from student's failure to comply with attendance policy); Zellman v. Indep. Sch. Dist. No. 2758, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999) (involving a zero grade for plagiarized project); *cf.* Hayes v. Unified Sch. Dist. No. 377, 669 F. Supp. 1519, 1528 (D. Kan. 1987) (addressing a time-out used as "in-school suspension"), *rev'd on other grounds*, 877 F.2d 809 (10th Cir. 1989). On the other hand, we included cases in which the action was not a disciplinary out-of-school suspension or expulsion but the court concluded that PDP applied due to a sufficient deprivation of property or liberty. *See, e.g.*, Ala. & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1335 (E.D. Tex. 1993) (involving extended in-school detention); Gamble v. Ware County Bd. of Educ., 561 S.E.2d 837, 844 (Ga. Ct. App. 2002) (addressing the placement of seriously stigmatizing entry in student's record); Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 458 (Miss. 1986) (discussing loss of semester credit). Similarly, the study included cases where the court reached the PDP issue even though the school authorities did not characterize the disciplinary action as a suspension or expulsion and regardless of whether the court concluded that they deprived the student of the requisite liberty or property interest. *See, e.g.*, M.S. *ex rel.* P.S. v. Eagle Union Cmty. Sch. Corp., 717 N.E.2d 1255, 1257 (Ind. App. Ct. 1999) (concerning removal from course).

79. *See, e.g.*, Murphy v. Fort Worth Indep. Sch. Dist., 258 F. Supp. 2d 569, 573 (N.D. Tex. 2003), *vacated as moot*, 334 F.3d 470 (5th Cir. 2003), *cf.* Seamons v. Snow, 84 F.3d 1226, 1234–35 (10th Cir. 1996), *rev'd on other grounds*, 206 F.3d 1021, 1028 (10th Cir. 2000).

80. The exceptions were cases where the court ruled that the alternative school transfer was a de facto suspension or expulsion due to an effectively different, inferior level of education. We included these cases in our analysis. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 623–24 (5th Cir. 2004).

81. *See, e.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997); Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318, 1323–24 (M.D. Ala. 2002); Stafford Mun. Sch. Dist. v. L.P., 64 S.W.3d 559, 563 (Tex. App. 2001); Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 655 (W.D. Tex. 2000) (indicating that assignment to an alternative education program that effectively acts as an exclusion from the educational process may implicate due process rights).

82. *See, e.g.*, Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 732 (2002).

of outcomes, the study follows the model of previous articles that counted issue rulings.[83] More specifically, an "issue ruling" within this study's framework refers to the ultimate judgment on a PDP issue. Here, "ultimate" means the highest court ruling on said issue.[84] In turn, PDP in this context consists of two categories:[85] (1) "Federal rulings," that is, those in which the court either relied strictly on,[86] or applied its extrapolated interpretation of, [87] *Goss* in its decision,[88] or (2) "State Law rulings," that is, those where the court relied on state statutes or regulations that did not simply codify[89] but expand *Goss*.[90] Finally, "issue" in this analysis refers to Federal and State Law rulings for each of two disciplinary actions—removals of up to ten school days and those for more than ten

83. *See, e.g.*, Margaret M. McMenamin & Perry A. Zirkel, *OCR Rulings Under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55, 56 (2003); Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 EDUC. L. REP. 369, 369–73 (1997).

84. On the other hand, if the case had further published proceedings for issues other than PDP, its analysis is based on the last relevant ruling, even though there may have been subsequent published proceedings. *See, e.g.*, Tun v. Fort Wayne Cmty. Sch., 326 F. Supp. 2d 932, 941–45 (N.D. Ind. 2004), *rev'd on other grounds sub nom.* Tun v. Whitticker, 398 F.3d 899, 904 (7th Cir. 2005). Conversely, if the case had an earlier published decision on other grounds, said earlier decision was not included in this analysis. *Compare, e.g.*, Hamilton v. Unionville-Chadds Ford Sch. Dist., 714 A.2d 1012, 1015 (Pa. 1998) (holding that the school district gave student adequate notice of the charges that furnished the bases for student's suspension) *with* Hamilton v. Union-Chadds Ford Sch. Dist., 693 A.2d 655, 656–57 (Pa. Commw. Ct. 1997) (holding that student's expulsion was improper under the void-for-vagueness doctrine).

85. *See supra* note 67 and accompanying text.

86. In terms of the Court's holding, *Goss* only addressed exclusions from school from one to ten days. *See supra* note 8 and accompanying text.

87. These court decisions used the *Goss* rationale and dicta for exclusions of more than ten days. *See supra* notes 6–7 and accompanying text.

88. In either event, these Federal rulings were based on Fourteenth Amendment PDP.

89. Conversely, the data in this study, in terms of both frequency and outcomes, classifies those rulings based on a state law that, in pertinent part, echoes the prescriptions in *Goss* as Federal issue rulings. *See, e.g.*, Katchak v. Glasgow Indep. Sch. Dist., 690 F. Supp. 580 (W.D. Ky. 1988).

90. These rulings encompass the PDP framework established not only for the subcategories of up-to-ten days and more-than-ten days, but also—depending on the state—for specified periods within the ten-day subcategory. *See, e.g.*, Wayne County Bd. of Educ. v. Tyre, 404 S.E.2d 809, 810–11 (Ga. Ct. App. 1991) (ruling on three-day suspension); Burns v. Hitchcock, 683 A.2d 1322, 1323–24 (Pa. Commw. Ct. 1996) (ruling on ten-day suspension); J.M. v. Webster County Bd. of Educ., 534 S.E.2d 50, 54–59 (W. Va. 2000) (ruling on one-year expulsion).

school days.[91] In the few cases where the court ruled on more than one Federal or State Law claim within one of these two separate disciplinary actions, the study aggregated the claims into one ruling, except where there was a difference in outcomes.[92]

Similarly, "outcomes" has a more precise definition that goes beyond a simple won-lost dichotomy. Specifically, following the lead of other outcomes analyses that used more sophisticated and customized classifications,[93] this study used the following five-point scale:

- 1 = conclusive decision in favor of the student,[94]
- 2 = inconclusive decision in favor of the student,[95]
- 3 = inconclusive for both parties,[96]
- 4 = inconclusive decision in favor of the school district,[97] and
- 5 = conclusive victory in favor of the school district.[98]

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91. Where the court ruled on both disciplinary actions separately, we included each of these rulings in our tabulation. Moreover, in the relatively few cases where the court included both Federal and State Law rulings in relation to one of these disciplinary actions, we tabulated these rulings separately in the analysis.

92. *See, e.g.*, Colquitt v. Rich Twp. High Sch. Dist. No. 227, 699 N.E.2d 1109, 1113, 1116–17 (Ill. App. Ct. 1998) (categorizing issue rulings into "5" for rejection of student's claim of entitlement to verbatim transcript and "1" for agreement with claim that reliance on hearsay evidence violated PDP). For an example limited to a requested preliminary injunction and, thus, classified as inconclusive due to the potential for final proceedings, see Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 928 (6th Cir. 1988). In this case, where the trial court dismissed the student's request for a preliminary injunction against a removal of more than ten days, the appellate court rejected the student's claims of (1) lack of cross examination or at least identification of student witnesses, (2) lack of cross examination of school administrators, and (3) improper participation in board hearing by administrators who recommended expulsion, but ruled in the student's favor on the student's claim that the same administrators improperly provided the board with evidence not shared with the student. *Id.* at 920. Thus, the study recorded issue rulings of "4" and "2" for this case.

93. *See, e.g.*, William H. Lupini & Perry A. Zirkel, *An Outcomes Analysis of Education Litigation*, 17 EDUC. POL'Y 257, 263–64 (2003) (utilizing a seven-point scale); James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469, 472 (1999) (using a five-point outcome scale); Zirkel & D'Angelo, *supra* note 82, at 738 (employing a three-category scale).

94. This category extends to (1) cases in which the student was successful and the remedy was a remand to the school board for a new hearing, or (2) successful student motions for summary judgment.

95. This category consists of (1) successful student motions for preliminary injunction, (2) unsuccessful district motions for dismissal or summary judgment, and (3) cases in which the student was successful, but the remedy was limited to a remand to the trial court.

96. This category is limited to cases in which both parties moved unsuccessfully for summary judgment.

97. This category consists of unsuccessful student motions for (1) a preliminary injunction or (2) summary judgment.

98. This category extends to successful district motions for (1) dismissal or (2) summary judgment.

V. RESULTS

Using multiple sources,[99] the study found a total of 165 cases yielding 191 issue rulings.[100] The outcome results for overall[101] issue rulings were:

- 12% (n = 22)—conclusive decision in favor of the student,[102]
- 7% (n = 13)—inconclusive decision in favor of the student,
- 0% (n = 0)—inconclusive for both parties,[103]

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99. *See supra* note 63.

100. The list of citations and tabular entries is available from the first author upon request.

101. *Overall* in this context refers to the total of Federal and State Law PDP rulings together. The outcome distributions for each of these five successive subcategories—from conclusive for students to conclusive for districts—were as follows:

Federal: 6% (n = 8); 8% (n = 11); 0% (n = 0); 7% (n = 10); 79% (n=110).

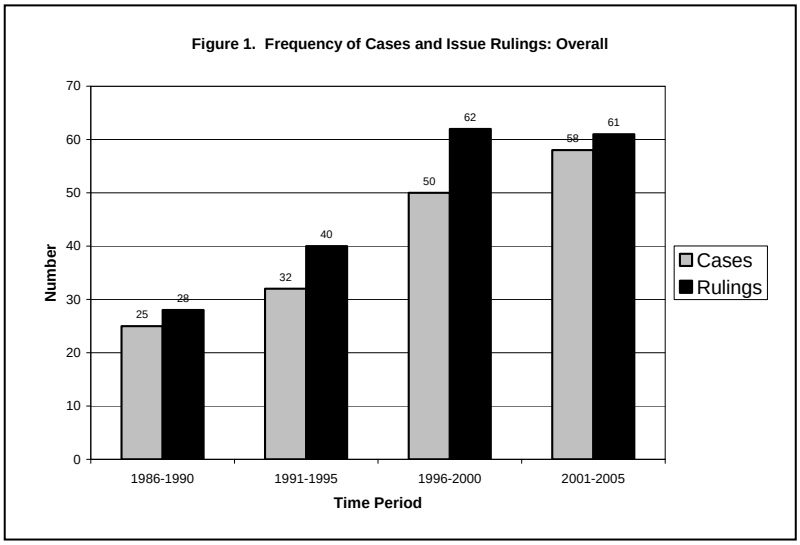
State Law: 27% (n = 14); 4% (n = 2); 0% (n = 0); 6% (n = 3); 63% (n = 33).

102. For the twenty-three issue rulings conclusively in favor of the students, the predominant remedies, in the cases where the court expressly specified the relief, were remand for a new school board hearing (n =7), expungement of the student's record (n = 4), and reinstatement (n = 3). For cases involving remand, see Colvin v. Lowndes County Sch. Dist., 114 F. Supp. 2d 504, 513 (N.D. Miss. 1999); Nichols v. DeStefano, 70 P.3d 505, 508 (Colo. Ct. App. 2002), *aff'd by an equally divided court*, 84 P.3d 496 (Colo. 2004); *In re* Expulsion of Z.K., 695 N.W.2d 656, 664 (Minn. Ct. App. 2005); *In re* Expulsion of E.J.W., 632 N.W.2d 775, 783 (Minn. Ct. App. 2001); Yatron v. Hamburg Area Sch. Dist., 631 A.2d 758, 762 (Pa. Commw. Ct. 1993); Pittsburgh Bd. of Pub. Educ. v. MJN, 524 A.2d 1385, 1390 (Pa. Commw. Ct. 1987); Stone v. Prosser Consol. Sch. Dist. No. 116, 971 P.2d 125, 128 (Wash. Ct. App. 1999). For cases addressing expungement, see Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 458 (Miss. 1986); Ruef v. Jordan, 605 N.Y.S.2d 530, 531 (N.Y. App. Div. 1993); Adrovet v. Brunswick City Sch. Dist. Bd. of Educ., 735 N.E.2d 995, 999–1000 (Ohio Ct. Com. Pl. 1999); Hardesty v. River View Local Sch. Dist. Bd. of Educ., 620 N.E.2d 272, 275 (Ohio Ct. Com. Pl. 1993). For cases dealing with reinstatement, see Murphy v. Fort Worth Indep. Sch. Dist., 258 F. Supp. 2d 569, 576 (N.D. Tex. 2003), *vacated as moot*, 334 F.3d 470 (5th Cir. 2003); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 449, 459–60 (W.D. Pa. 2001); Doe v. Rockingham County Sch. Bd., 658 F. Supp. 403, 406, 410 (W.D. Va. 1987). Additionally, in only one of the twenty-three conclusive rulings in favor of the student did the court expressly provide for money damages, and even then only awarded a nominal amount. *See Warren County Bd. of Educ.*, 500 So. 2d at 458 (awarding one dollar); c*f. Killion*, 136 F. Supp. 2d at 460 (scheduling a subsequent hearing for money damages that were presumably attributable to federal constitutional violations of free speech and vagueness, rather than PDP). Finally, the court awarded attorney's fees in only two cases. *See Doe*, 658 F. Supp. at 411 (awarding, presumably in full, attorney's fees and costs); *Warren County Bd. of Educ.*, 500 So. 2d at 458 (awarding only $1,000, which was less than ample in light of litigation spanning from the state's chancery court to the state's highest courts, and which was couched as an addition to the nominal one dollar awarded as damages).

103. Because there were no inconclusive rulings for both parties, the figures for outcomes do not include an entry for classification "3."

- 7% (n = 13)—inconclusive decision in favor of the school district, and
- 74% (n = 143)—conclusive victory in favor of the school district.[104]

Figure 1 displays the frequency of cases and issue rulings per five-year interval.[105]



Examination of Figure 1 illustrates a consistent upward trend in both categories.

104. In one of these cases, the court went so far as requiring the student's attorney to pay $100,000, as a sanction, for the district's attorney's fees. Giangrasso v. Kittatinny Reg'l High Sch. Bd. of Educ., 865 F. Supp. 1133, 1142–43 (D.N.J. 1994).

105. The juxtaposition of these two units of analysis provides a means of transitioning from the measures employed most frequently in previous research—"cases" (representing court decisions)—to the more precise measure in this study—"issue rulings" (representing PDP issue rulings).

Figure 2 divides the frequency of issue rulings into Federal and State Law subgroups.[106]

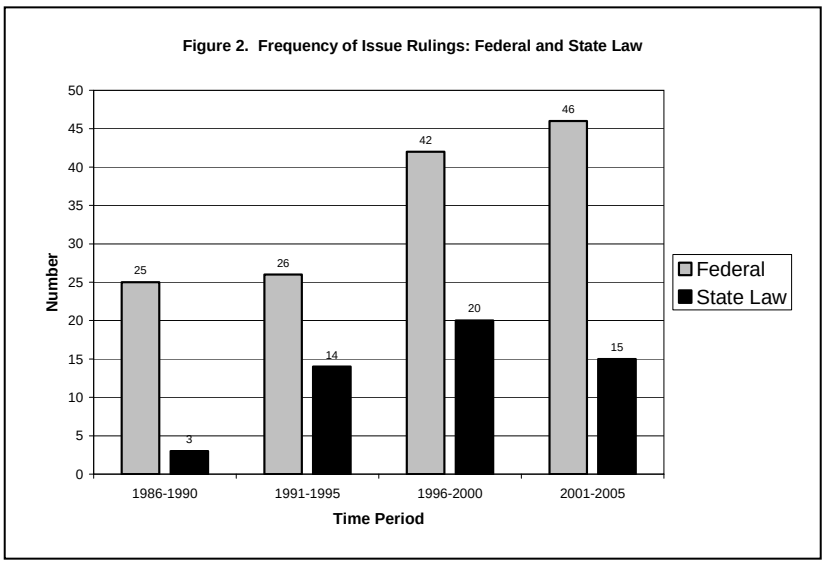


Figure 2 shows a steady increase for each of the successive five-year periods for the Federal rulings. In partial contrast, State Law rulings increased initially, but the three most recent five-year periods approximated an uneven plateau rather than a continuing steep upslope.

Figure 3 presents the outcome results for each of the successive five-year periods.

106. By broadening the analysis to a discussion of PDP issue rulings, the study allows for more meticulous scrutiny by accounting for those decisions that have both a *Goss* and state law basis. Thus, by approaching the data in this more nuanced fashion,

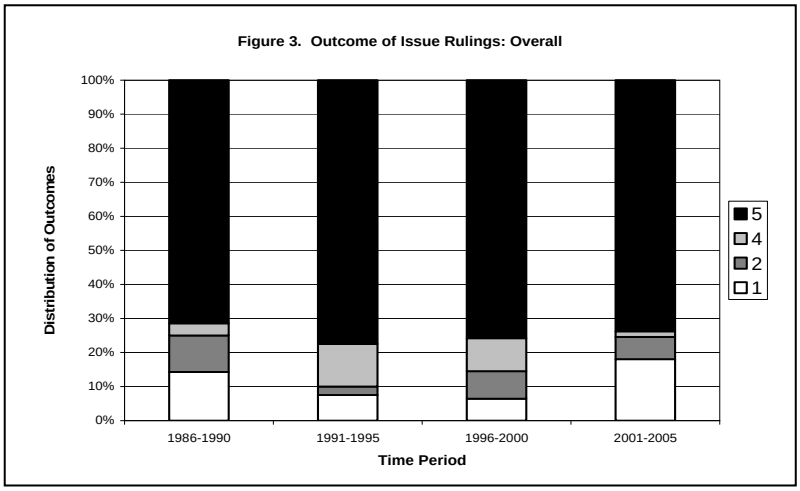


Figure 3 shows that the overall trend in outcomes has rather clearly and consistently been in favor of school districts. For conclusive rulings, being those at the polar positions (that is, "1" in favor of the student, and "5" in favor of the school district), students fared slightly better in the first and most recent period, but districts won approximately 70%–75% throughout the twenty-year span.

Figures 4 and 5 are derivatives of Figure 3 and offer a means for comparing the outcomes of Federal and State Law issue rulings.

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the study avoids wrongfully pigeonholing a court decision as being based solely on Fourteenth Amendment PDP or state statutes or regulations.

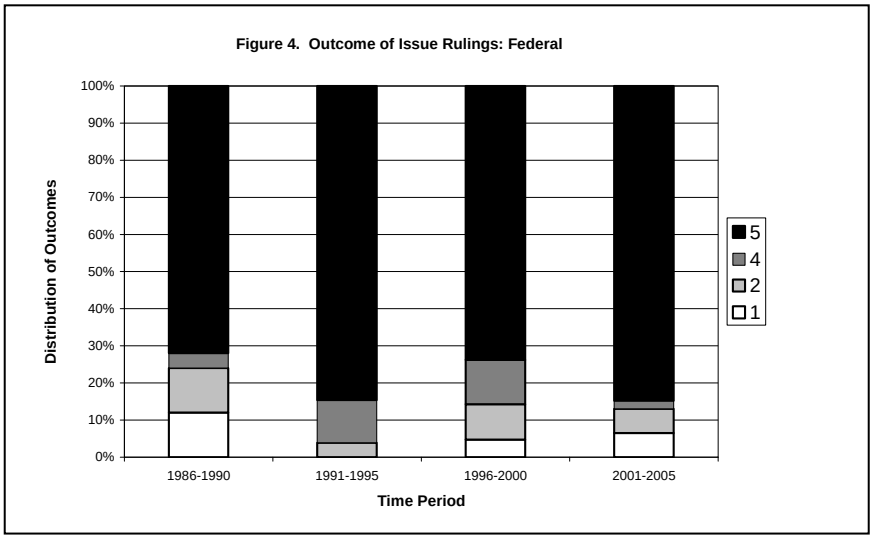

Figure 4, which displays the outcome results for the Federal issue rulings, reveals that the trend in favor of school districts for this subgroup is even more pronounced than in Figure 3.

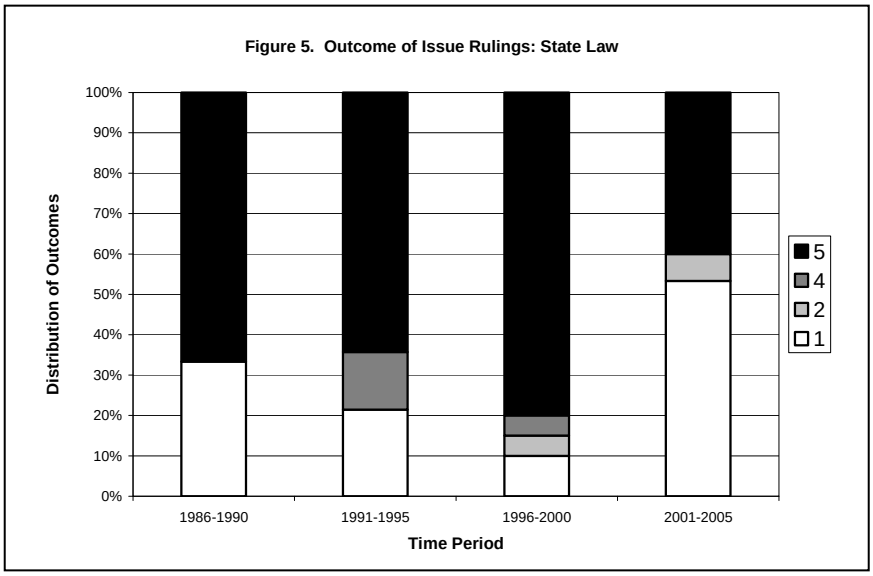

Figure 5, which presents the results for issue rulings based on state statutes and regulations, evidences a more variable trend. Generally, however, students fared better in these issue rulings than those based on Fourteenth Amendment PDP, although the outcomes were, for the most part, still in favor of the districts. Most notably, students won the majority of the conclusive rulings for the most recent five-year period. However, as Figure 2 revealed, these percentages are based on comparatively lower numbers of issue rulings.

VI. DISCUSSION

Overall, the findings of this study were that: (1) the *Goss* progeny has generally increased during the most recent twenty years, and (2) the outcomes during this recent period have strongly favored school authorities.

A. Frequency

The tabular data for overall frequency show a steady increase in the number of court decisions during the study's twenty-year span. This rather clear-cut pattern is only partially in line with previous studies. More specifically, Lufler found a notable decrease in the volume of PDP cases in the two five-year periods following *Goss*, but the extrapolated results for the 1985–1989 period, which overlaps with this study's initial five-year period, seem to foreshadow the upturn in frequency that this study found.[107] Similarly, Arum's initial study, which was not limited to PDP cases, reported a moderately fluctuating frequency during the seventeen-year period following *Goss*;[108] although, in a more recent article, he referred in passing to an ascending arc for the years 1990–2000.[109]

A more precise measure of frequency than court decisions, or cases, is the disposition specific to the PDP claim, herein referred to plurally as "rulings."[110] Figure 1 reveals a pattern for rulings parallel to the pattern for cases, with the exception of a possible leveling between the last two five-year periods. The source of this recent change is revealed in Figure 2, which disaggregates the frequency data, juxtaposing those rulings based

107. Although Lufler's extrapolated results for the years 1985–1989 showed only a slight increase in cases from the previous five-year period, they signaled a possible reversal from the downward trend exhibited during the fifteen-year period beginning in 1975. *See supra* notes 29–30 and accompanying text.

108. *See supra* notes 38–40 and accompanying text.

109. Arum, *supra* note 51, at 44.

110. *See supra* notes 83–84 and accompanying text.

on the Fourteenth Amendment, herein referred to as "Federal," with those based on state statutes or regulations, herein referred to as "State Law." The Federal rulings follow a steady upward trajectory; thus, the slowed growth is not attributable to them. In contrast, the growth in State Law rulings is unsustained and, particularly during the final three five-year periods, the pattern appears to plateau; thus, the state data appear to account for the recent slowed growth in the overall volume of rulings.

Although the growth in Federal rulings is rather clear, the reason for it is not. The outcomes of the cases do not provide, at least directly, an explanation. Indeed, one would expect the increasingly school district-friendly outcomes to decelerate, rather than stimulate, legal challenges. Therefore, it is likely that students and their attorneys were largely unaware of their limited and declining odds of success. This lack of outcomes information may be attributable to the time lag between the emergence of a detectable trend and the dissemination of the resulting scholarly research.

Furthermore, it is possible that student-plaintiffs were not only ill informed, but also misinformed. That is to say, the probable lack of outcomes data, which may have curtailed plaintiffs' lawsuits, was perhaps compounded by skewed media reports, which may have in turn heightened plaintiffs' legal expectations. More specifically, the publicity of exceptional cases, content on special-interest websites, and articles written by academic professionals may have collectively reinforced, or even fostered, mistaken assumptions about the probability of prevailing on a disciplinary challenge.[111]

Finally, a contributing factor to the growth of Federal rulings may be the zero-tolerance approach, which took shape starting with the Gun Free Schools Act of 1994[112] and quickly expanded to a whole host of student infractions relating to violence and drugs.[113] This draconian

111. *See supra* notes 19–21, 51–55 and accompanying text.

112. Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994) (repealed by No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1011(5), 115 Stat. 1425, 1986 (2002)). The No Child Left Behind Act repealed and then reauthorized the Gun-Free Schools Act with some slight clarifications and modifications.

113. *See, e.g.*, RONNIE CASELLA, AT ZERO TOLERANCE: PUNISHMENT, PREVENTION, AND SCHOOL VIOLENCE 24–25 (2001); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, *in* ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE? 17, 22–24 (Russell J. Skiba & Gil G. Noam eds., 2001); Robert C. Cloud, *Due Process and Zero Tolerance:*

approach, which typically provides for expulsions of one year or more with limited discretionary exceptions, obviously made such disciplinary actions high stakes for the expelled students and an undisputed denial of property and liberty interests under Fourteenth Amendment PDP, thus increasing the incentive for making a federal case of the matter.[114]

The overall pattern of State Law rulings—which, although approximating more of an uneven plateau for the three most recent five-year periods, initially paralleled the growth in Federal rulings—also lacks an obvious explanation. One might have expected greater growth in State Law than Federal rulings in light of their more favorable outcomes during the entire period.[115] However, with due caution for the small number of rulings (particularly the total of only three rulings for the 1986–1990 period), this disconnect between frequency and outcomes may also be attributable in part to information and opportunity.

First, this differential pattern for State Law rulings may be based on insufficient or misleading information. More specifically, the information generally available to the parents and attorneys of suspended or expelled students about the outcomes of PDP litigation would seem to connect their prospects for successful suits to *Goss* and, by extension, to claims under federal law. For example, Arum's Washington Post Op-Ed piece asserted that *Goss* created for students "newfound legal rights . . . and entitlements in cases that largely involve school violence, weapons, drugs and general misbehavior."[116] The reader's inference is that the appropriate avenue for disciplinary challenges is Fourteenth Amendment PDP, which was the basis for *Goss*. In contrast, there is no implicit recommendation to resort to state legislation or regulations, which can offer PDP protections that go beyond those in *Goss*.[117] Thus, the public highlighting of *Goss* in relation to students' rights could be the basis for plaintiff attorneys' seeming preference to rely on federal, rather than state, claims of PDP.

Second, depending on the time and location of the suit, the plaintiff attorneys may not have had the luxury of availing their clients of greater procedural protections under state statutes and regulations. More

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An Uneasy Alliance, 178 EDUC. L. REP. 1, 2–3 (2003); Darcia Harris Bowman, *Interpretations of "Zero Tolerance" Vary*, EDUC. WK., Apr. 10, 2002, at 1.

114. This factor would also appear to contribute to State Law rulings, at least in states that provide added PDP protections, but—as discussed *infra*—the pattern did not follow suit for the most recent five-year period.

115. *See supra* Figures 4–5.

116. Arum, *supra* note 18.

117. *See, e.g.*, MINN. STAT. ANN. § 121A.47(9) (West 2008) (giving students the right to confront and cross examine witnesses at disciplinary hearing); 22 PA. CODE § 12.8 (2008) (requiring a formal hearing in all expulsion actions); ARK. CODE ANN. § 6-18-507(c)(1)–(2) (2007) (providing students the right to appeal suspensions to the school board or superintendent).

specifically, the suspension or expulsion may have arisen in a state that either lacked a law providing stronger procedural protection or that previously had such a law but eliminated it prior to the suit. Although systematic data specific to state PDP protections for students are not available,[118] it may well be that as the societal pendulum swung away from student rights, some states may have reduced or removed their procedural protections that went beyond *Goss*.[119] Thus, in an undetermined and perhaps increasing number of states, students' attorneys may have had no choice but to base their claims exclusively on Fourteenth Amendment PDP.

Third, the significant disparity between Federal and State Law PDP outcomes may be due to the availability of certain remedies through only one avenue, not the other. For example, attorney's fees in *Goss*-type cases are available to prevailing plaintiffs for their federal law claims, not—in most jurisdictions—their state law claims.[120] Although, in itself, this advantage may not prove decisive for an attorney weighing the benefits of raising a PDP claim under either federal or state law, it adds to the two foregoing factors that contribute to a federal claim.

B. Outcomes

In contrast to the steadily increasing pattern in overall frequency, the pattern for overall outcomes on an issue by issue basis is rather steady—and, for students, quite bleak. Indeed, the situation for plaintiff-students is even darker than the overall PDP outcomes indicate[121] given that:

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118. The Education Commission of the States tracks state laws for suspension and expulsion, but the compilation is limited to the past six to seven years and lacks any systematic categorization. *See, e.g.*, EDUCATION COMMISSION OF THE STATES, ECS STATENOTES 2006 COLLECTION 1–4 (2006), http://ecs.org/html/educationIssues/StateNotes/2006 StateNotes.pdf (failing to show a category for discipline).

119. *See, e.g.*, Perry A. Zirkel, *National Trends in Education Litigation: Supreme Court Decisions Concerning Students*, 27 J.L. & EDUC. 235, 242 (1998).

120. 42 U.S.C. § 1988(b)–(c) (2000). Statutory counterparts in State Law rulings are rare and only indirectly connected to PDP. *See, e.g.*, Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp. 2d 664, 669 (D. Minn. 1999) (discussing a Minnesota statute that enables "a person 'who suffers any damages as a result of [a Minnesota Data Practices Act] violation' . . . to recover 'any damages sustained, plus costs and reasonable attorney fees.'" (quoting MINN. STAT. § 13.08(1) (2007))).

121. On the other hand, the plaintiff students won at a higher rate on a case-by-case basis if one analyzed the overall outcome to include their alternative claims, such as First Amendment expression or Fourth Amendment search and seizure, not just their PDP claims alone.

(1) these data do not include the completely adverse results for students in the cases where the court regarded the disciplinary action or effect as de minimis,[122] and (2) the comparatively few conclusive rulings in favor of the student often yielded nominal remedies, including a remand to the school board for a new hearing.[123] The outcomes specific to Federal rulings are even more dramatically in favor of school districts, albeit with a rather oscillating pattern for the conclusive district victories. In contrast, the outcome results for State Law rulings present a more favorable outlook for students, particularly in the final five-year period.

The clear-cut pattern for overall outcomes is in line with, and extends, the findings of previous studies, although both Lufler's and Arum's methodologies differ from the present study's methodology in terms of scope[124] and specificity.[125] More specifically, both Lufler and Arum found that school districts won an increasing majority of cases in the fifteen-year period following *Goss*.[126] Our findings, which focused more narrowly on PDP, were congruent with these previous studies for the overlapping period in the second half of the 1980s and seemed to

122. *See supra* notes 76–81 and accompanying text. Conversely, we included in our analysis cases where the court either accorded or assumed the requisite liberty or property denial. Some of these cases were extracurricular exclusions. *See supra* note 76 and accompanying text. The other cases pertained to in-school suspensions. *See, e.g.*, Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988) (ruling that denial "would depend on the extent to which the student was deprived of instruction or the opportunity to learn."); Orange v. County of Grundy, 950 F. Supp. 1365, 1372 (E.D. Tenn. 1996) (avoiding issue of whether plaintiffs were deprived of a property or liberty interest in light of district's failure to dispute it).

123. *See supra* note 102. The rarity of awards of money damages is attributable in notable part to defendant-friendly precedents in terms of qualified immunity for school officials, the hurdles for institutional liability, and the need for actual injury. *See, e.g.*, Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 928 (6th Cir. 1988) (requiring plaintiff to show actual injury to the extent plaintiff seeks money damages); Posthumus v. Bd. of Educ. of Mona Shores Pub. Sch., 380 F. Supp. 2d 891, 896–98 (W.D. Mich. 2005) (undertaking a qualified immunity analysis); Jacobs v. Clark County Sch. Dist., 373 F. Supp. 2d 1162, 1193 (D. Nev. 2005) (requiring plaintiff to show actual injury); Tun v. Fort Wayne Cmty. Sch., 326 F. Supp. 2d 932, 938–39 (N.D. Ind. 2004) (finding the school district lacks institutional liability), *rev'd on other grounds*, Tun v. Whitticker, 398 F.3d 899, 904 (7th Cir. 2005); Demers v. Leominster Sch. Dep't, 263 F. Supp. 2d 195, 208 (D. Mass. 2003) (finding the school district is entitled to qualified immunity); *cf.* Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 458 (Miss. 1986) (granting requested injunction without actually reviewing the actions of the Board).

124. In contrast with our study, Lufler's outcomes analysis was limited to cases with conclusive rulings, see *supra* note 31, and Arum's selection criteria excluded federal district court decisions, see *supra* note 37.

125. In contrast with our study, neither Lufler nor Arum disaggregated their data, either for frequency or outcomes, into Fourteenth Amendment PDP and state law PDP subcategories.

126. *See supra* notes 32, 42, 43, and accompanying text.

suggest a saturation, or ceiling, effect in the 1990s, particularly for the Federal, as compared with State Law, PDP rulings.

The primary reasons for the pattern in overall outcomes are two overlapping societal and judicial trends. More specifically, the applicable societal trend is the general shift from individual rights to collective welfare in the school context, whereas the concurrent and seemingly consequent judicial trend is increasing deference to public school authorities. The societal shift toward a collective, or governmental, interest was evident in the increasing public perception of a "war" on drugs and violence in society generally and in schools, particularly after *Goss*.[127] For example, in its 1986 decision in *New Jersey v. T.L.O.*, the Court reasoned:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. . . . Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures . . . .[128]

The episodes of school fatalities, punctuated by the shootings at Columbine High School in 1999,[129] served to accelerate the increasing institutional interest in school safety and security.[130]

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127. *Cf.* Abigail Thernstrom, *Where Did All the Order Go? School Discipline and the Law*, *in* 1999 BROOKINGS PAPERS ON EDUCATIONAL POLICY 299, 299–301 (Diane Ravitch ed., 1999) (citing statistical data that suggest rising crime and disorder in the nation's schools).

128. New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1986). Interestingly, the Court cited the following dictum from *Goss* in support of its school security rationale: "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Id.* at 339 (citing Goss v. Lopez, 419 U.S. 565, 580 (1975)). The *T.L.O.* Court also cited *Ingraham v. Wright*, in which the Court recognized "the seriousness of the disciplinary problems in the Nation's public schools." Ingraham v. Wright, 430 U.S. 651, 681–82 n.53.

129. *See* James Brooke, *2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1.

130. *See* Cloud, *supra* note 113, at 17 ("Although public schools are now among the safest places for students to be, the perception lingers that they are unsafe because of recent and highly publicized campus tragedies."). For a direct judicial example within the *Goss* progeny, see Williams v. Cambridge Bd. of Educ., 370 F.3d 630, 643 (6th Cir. 2004) ("The tragic destruction at Columbine High School . . . etched devastating images of adolescent rage run amok onto the national consciousness. The realization that the perpetrators of this violence were young teenagers crystallized latent fears that a new danger had emerged from within our own communities."). For a more recent example in the *T.L.O.* progeny, see D.L. v. State, 877 N.E.2d 500, 501 (Ind. Ct. App. 2007) ("in this post-Columbine world").

The overlapping trend of increasing judicial deference toward school authorities represents a return to the judicial stance of the pre-*Goss* era.[131] Indeed, prior to *Goss*, education litigation was limited, with courts traditionally tending to abstain from interfering with the discretion of school boards.[132] The successive decisions in *Tinker* and *Goss* represented a relative high-water mark for the individual rights of students. However, the results and the rationales in the post-*Goss* case law reflect a systematic swing back to this traditional, deferential stance.[133]

Previous studies showed the post-*Goss* shift in results of student litigation more generally. More specifically, Zirkel found that school authorities won the Supreme Court student litigation that was based on secular constitutional grounds rather consistently after the brief *Tinker-Goss* period.[134] Subsequently, Lupini and Zirkel, in an empirical analysis of the outcomes of education litigation arising in the K-12 setting, found a statistically significant shift in favor of school districts from the mid-1970s to the mid-1990s in the student, not employee or other plaintiff, cases.[135] In a follow-up study, Anastasia D'Angelo and Zirkel, using wider,[136] more up-to-date,[137] and more representative samples than Lupini,[138] and focusing exclusively on student litigation, confirmed a statistically significant shift in favor of school authorities during the two decades after *Goss*.[139]

The rationales of the *Goss* progeny provide further evidence of the shift in favor of school authorities in terms of both school security and judicial deference. More specifically, although the dicta in the post-

131. *See, e.g.*, Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights after* Board of Education v. Earls, 56 S.C. L. REV. 1, 7–10 (2004).

132. *See, e.g.*, Zirkel, *supra* note 61, at 345.

133. The return of the proverbial pendulum started almost immediately and specifically for PDP. *See supra* note 32 and text accompanying note 43 and *see infra* note 148. More generally, the trend from judicial activism to judicial self-restraint continues today. *See, e.g.*, Jess Bravin, *Court Under Roberts Limits Judicial Power*, WALL ST. J., July 2, 2007, at A1.

134. Zirkel, *supra* note 119, at 238–39. These grounds, including but not at all limited to PDP, were distinguishable from Establishment Clause cases, which interposed the institutional interests of religion, and statutory cases, which provided less latitude for judicial discretion. *Id.*

135. Lupini & Zirkel, *supra* note 93, at 257.

136. Anastasia D. D'Angelo & Perry A. Zirkel, *An Outcomes Analysis of Student-Initiated Education Litigation: A Comparison of 1977–1981 and 1997–2001 Decisions*, 226 EDUC. L. REP. 539, 540–41 (2008). Their samples were for five-year periods compared to the three-year periods in Lupini & Zirkel. *Id.*

137. Their second period ended in 2001, whereas the second period in Lupini & Zirkel ended in 1996. *Id.*

138. D'Angelo & Zirkel identified other Westlaw key-number categories that yielded additional pertinent cases. *Id.* at 541.

139. *Id.* at 550.

Goss case law addressing the societal interest in school security tend to appear within the parts of the opinion specific to other constitutional bases, they reflect the courts' recognition of the increasing interest in collective safety and security. For example, a federal district court's discussion of an Equal Protection claim underscored the school's "interest in maintaining a safe school environment, particularly in light of the apprehensive climate that existed at the time due to highly publicized incidents of school violence around the country."[140] In a more general allusion, the Fifth Circuit prefaced a more recent expulsion case as "highlight[ing] the difficulties of school administrators charged to balance their duty to provide a safe school with the constitutional rights of individual students when violence in schools is a serious concern."[141] Additionally, the discussions specific to PDP more directly acknowledge judicial deference, ranging from cursory mention[142] to more detailed specific[143] or general application.[144]

This overall trend in favor of school authorities is even more pronounced in the outcomes for Federal issue rulings, yet it is noticeably less evident in the results for State Law rulings. The more favorable, but still largely adverse, outcome pattern for State Law rulings is primarily attributable to the stronger procedural requirements in some state laws. More specifically, the procedures prescribed in *Goss*, which are the basis for Federal PDP claims, are rudimentary and flexible, therefore permitting a more interpretative judicial posture. In contrast, the procedures prescribed in certain states,[145] which are the basis for State Law PDP claims, are

140. Demers v. Leominster Sch. Dep't, 263 F. Supp. 2d 195, 206 (D. Mass. 2003).

141. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 611 (5th Cir. 2004).

142. *See, e.g.*, Pirschel v. Sorrell, 2 F. Supp. 2d 930, 934 (E.D. Ky. 1998) ("[W]hile students clearly are not stripped of their constitutional rights at the schoolhouse gate, decisions made by school officials in imposing discipline are afforded considerable deference.").

143. *See, e.g.*, Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 245 F. Supp. 2d 1188, 1196 (D.N.M. 2002) ("Giving due deference to the school administrators in the minute contours of the disciplinary hearing has always been a hallmark of the federal courts."), *rev'd on other grounds*, 341 F.3d 1197, 1201 (10th Cir. 2003).

144. *See, e.g.*, D.F. v. Bd. of Educ. of Syosset Cent. Sch. Dist., 386 F. Supp. 2d 119, 131 (E.D.N.Y. 2005) ("This Court should not be a haven for complaints by students and their parents against actions taken by school officials in their extremely difficult task of educating and controlling the irresponsible behavior of their students. As is often the case, as it is here, these types of conflicts are better handled within the educational system and not in the federal trial and appellate courts.").

145. For example, the states that cumulatively accounted for approximately half of the State Law rulings were, in order, New York, Pennsylvania, Ohio, and Minnesota.

more specific and seemingly stricter, therefore curtailing a judge's latitude for deference.[146] Thus, it is not surprising that judges ruled conclusively in favor of the student in only 6% of the Federal PDP rulings, as opposed to 27% in the State Law PDP rulings.[147]

In conclusion, contrary to the position of the various commentators and the mass media,[148] *Goss* is not responsible for a dramatic expansion of students' PDP rights.[149] Although the *Goss* dissent was partially correct to the extent that the lower court progeny has amounted to a rising tide, although not a flood,[150] the results of this study disprove the dissent's accompanying prediction of judicial activism.[151] The primary source of any expansion of the *Goss* decision is not the judiciary, from the *Goss* Court to the federal and state courts that have interpreted its decision, but state codes, either in the form of legislation or regulation. Thus, although within her overly broad analysis Underwood was wrong about the courts,[152] she was correct that state policy makers are ultimately responsible for choosing either to add procedural levels to *Goss* or to leave undisturbed its constitutional and ultimately judicially constructed minimal foundation.[153]

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146. However, the increased judicial concern with student safety has in some cases overwritten requirements of state law. *See, e.g.*, *D.F.*, 386 F. Supp. 2d at 126–27 (interpreting violations of New York state law requirements for advance notice and cross-examination as, in effect, harmless errors).

147. *See supra* note 101.

148. *See supra* notes 17–21 and accompanying text.

149. Indeed, in a string of decisions almost immediately thereafter, the Supreme Court limited the effect of *Goss*. *See* Carey v. Piphus, 435 U.S. 247, 248 (1978) (requiring proof of actual injury for more than nominal damages in PDP cases); Ingraham v. Wright, 430 U.S. 651, 672 (1977) (ruling against PDP claim in corporal punishment context in light of traditional common law remedies); Wood v. Strickland, 420 U.S. 308, 322 (1975) (establishing qualified immunity in expulsion case). For a second stage of limitations, see, for example, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) ("[D]amages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in such cases."); Bd. of Educ. v. McCluskey, 458 U.S. 966, 971 (1982) (holding that school board's interpretation of its own regulations controls). In a parallel and interrelated movement, the Court has also narrowed the interpretation of the Due Process Clause in terms of public employees. *See, e.g.*, Siegert v. Gilley, 500 U.S. 226, 233–34 (1991); Bishop v. Wood, 426 U.S. 341, 349–50 (1976).

150. *See supra* note 15 and accompanying text.

151. *See supra* note 16 and accompanying text.

152. *See supra* note 2 and accompanying text. Like Arum, Underwood's case law support was in the same direction as our findings. Yet, she identified the courts, in addition to state and local authorities, as "hav[ing] expanded the minimal due process set forth in *Goss*." Underwood, *supra* note 1, at 798.

153. Specifically, her ultimate conclusion was as follows: "Certainly the three minute due process is still within constitutional limits. Since control of the schools rests in the hands of state legislatures, it would be up to them [to] enact such laws in their states. I would urge them to do so." Underwood, *supra* note 1, at 805–06.